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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM F. GLOVER,
Petitioner,

vs.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misinterpreted and misapplied the legal standard for an award of liquidated damages under the Age Discrimination in Employment Act as set forth in *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993)?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Petition for Certiorari	6
Conclusion	14
Appendix:	
Opinion of the United States Court of Appeals for the Eighth Circuit dated January 7, 1994	A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Soc. of Mech. Engr's v. Hydrolevel Corp., 102 S.Ct. 1935 (1982) 8

Bethea v. Levi Strauss & Co., 827 F.2d 355 (8th Cir. 1987) 10,11

Formby v. Farmers and Merchants Bank, 904 F.2d 627 (11th Cir. 1990) 10

Glover v. McDonnell Douglas Corp., 981 F.2d 388 (8th Cir. 1992) 4,5

Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993)..... 5,9-13

Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993) 8

Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094 (11th Cir. 1987) 10

Neufeld v. Searle Laboratories, 884 F.2d 335 (8th Cir. 1989) 10

Spulak v. K Mart Corp., 894 F.2d 1150 (10th Cir. 1990) 11

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 6,9-11

Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985) 12

Statute:

Age Discrimination in Employment Act.....*passim*

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on January 7, 1994, is officially reported at 12 F.3d 845 (8th Cir. 1994). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on January 7, 1994. Plaintiff Glover filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition on February 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

The liquidated damages provision of the Age Discrimination in Employment Act provides as follows:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter.

See 29 U.S.C. §626(b).

STATEMENT OF THE CASE

The Petitioner, plaintiff William Glover, worked in the Accounting Department of the Respondent, defendant McDonnell Douglas Corporation. Several years ago, the company consolidated three of its subsidiaries. As a result of the consolidation, jobs were eliminated. Joseph Barbeau, the company manager in charge of the newly consolidated Accounting Department, was told to select three people in his department for termination. He selected three employees, all of them over the age of 40. One of them was Mr. Glover. At the time, Mr. Glover was 59 years of age. He was the oldest employee in the Accounts Payable Section of the Accounting Department and the one with the most seniority, over 20 years.

Mr. Barbeau was free to select any three employees in the Accounting Department for termination. However, job performance and years of service were supposed to be key factors in determining who would stay and who would go. Armed with these criteria, Mr. Barbeau proceeded to do some very strange things. He selected Mr. Glover for termination and saved several younger employees in the department who had less ability and less seniority than Mr. Glover.

Mr. Glover's job performance with the company was competent and satisfactory. He had never been disciplined or told his job was in jeopardy. On the contrary, he had been told repeatedly that his job performance was "good." Indeed, his performance evaluations in the four years preceding his termination were positive. Moreover, he had over 20 years of seniority with the company. Nevertheless, he was let go in favor of much younger co-workers in the Accounting Department who were less qualified and had less seniority. In particular, he was selected over one co-worker, 23 years old, who had been employed with the company less than 3 years; a second co-worker, 31 years old, who had less than 1 year experience as a regular full time employee; a third co-worker, 33 years old, who had less than 1 year of experience with the company; and a fourth co-worker, 24 years old, who had less than 2 years of experience with the company. Significantly, the 24 year old employee was a poor performer; according to Mr. Barbeau she was a "recent disappointment." This employee, unlike Mr. Glover, received sharply negative job evaluations which documented numerous deficiencies in her job performance. Moreover, the 33 year old employee ranked *below* Mr. Glover on the company's "totem pole" which listed employees in order of their job performance and value to the company. Merit and seniority were supposed to determine who did, and who did not, survive the reduction in force. The fact that Mr. Barbeau departed from these criteria in selecting Mr. Glover for termination constituted compelling circumstantial evidence of age discrimination.

There was also direct evidence of intentional age discrimination. Mr. Barbeau's handwritten notes show that he went out of his way to record the ages of many of the employees he was considering for termination. According to Mr. Barbeau, he did this because his superiors needed the information to review the lawfulness of his decisions. However, there was no evidence that Mr. Barbeau's superiors asked him to record the ages of employees or that they in any way used the information he

recorded to evaluate the lawfulness of his decisions. Thus, it was a reasonable inference that Mr. Barbeau recorded the information for the illegitimate purpose of facilitating discrimination on the basis of age. Moreover, it is important to note that Mr. Barbeau's handwritten notes reflect the notation "young, more potential" next to the name of Laura Pund, age 27, who was saved from termination. This age-related comment was direct evidence of Mr. Barbeau's preoccupation with age. It showed that he wanted to retain younger employees, like Ms. Pund, rather than older employees, like Mr. Glover, because the younger employees had a longer future with the company.

Mr. Barbeau knew it was wrong under the law to fire Mr. Glover on account of his age, 59. Indeed, he was briefed on the prohibitions of the Age Discrimination in Employment Act (ADEA) shortly before he selected Mr. Glover for termination in the reduction in force. He was specifically told it was unlawful to fire an employee because of his age. In addition, his handwritten notes showed a sophisticated understanding of the statute. For example, his notes distinguished between "disparate treatment" and "disparate impact" cases under the ADEA.

Plaintiff Glover filed this lawsuit alleging that he was the victim of age discrimination in violation of the ADEA. After hearing four days of testimony, the jury agreed with Mr. Glover and awarded him $30,000 in back pay. The jury found the violation to be "willful" so Mr. Glover was awarded $30,000 in additional liquidated damages under the ADEA. On appeal, the Eighth Circuit Court of Appeals affirmed the jury's finding of intentional age discrimination. The Court noted that Mr. Glover produced direct, as well as circumstantial, proof of age discrimination by McDonnell Douglas. Accordingly, it affirmed the award of $30,000 in back pay. *See Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 392-393 (8th Cir. 1992).

At the same time, however, the Court of Appeals reversed the award of $30,000 in liquidated damages under the ADEA.

According to the Court, there was insufficient evidence, as a matter of law, to show that McDonnell Douglas possessed the requisite culpable state of mind to justify the award against it. The Court was not impressed with the evidence showing that Mr. Barbeau knew his conduct was unlawful. According to the Court, "additional evidence" was needed to justify the award. The Court concluded there was no such "additional evidence" in this case. *See Glover, supra*, 981 F.2d at 395-396.

Several months later, the U.S. Supreme Court decided *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993). In *Hazen Paper Co.*, the Supreme Court overruled Eighth Circuit caselaw on liquidated damages. The Court held that when an employer does what it knows the ADEA prohibits liquidated damages can be awarded against it. *Id.* at 1708-1710. Significantly, the Court rejected the notion, endorsed by the Eighth Circuit, that "additional evidence" is needed to justify such an award. *Id.* at 1709. After *Hazen Paper Co.* was decided, Mr. Glover filed a petition for a writ of certiorari with the Supreme Court. The Supreme Court vacated the judgment of the Eighth Circuit and remanded the case for further consideration in light of *Hazen Paper Co.* 114 S.Ct. 42 (Oct. 4, 1993).

On remand, the Eighth Circuit refused to alter its prior decision. Once again, the Court concluded that McDonnell Douglas was guilty of "intentional" age discrimination but not "willful" age discrimination. *See* Appendix at A5-A7. Mr. Glover filed this timely petition for a writ of certiorari challenging the Eighth Circuit's ruling.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The ADEA distinguishes between "intentional" and "willful" violations of the statute. A violation is "intentional" if the employer deliberately treats an older employee adversely on account of his age; a violation is "willful" if, in addition to deliberately treating the older employee adversely on account of his age, the employer knows, or acts in reckless disregard of the fact, that it is unlawful to treat the employee adversely on account of his age. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-129 (1985). In this case, the Eighth Circuit affirmed the jury's finding that McDonnell Douglas was guilty of "intentional" age discrimination against Mr. Glover. The culpable decisionmaker, Mr. Barbeau, selected Mr. Glover for termination during a reduction in force on account of his age, 59. At the same time, however, the Eighth Circuit reversed the jury's finding that the age discrimination was "willful" and vacated the award of liquidated damages in Mr. Glover's favor. According to the Eighth Circuit, Mr. Barbeau did not know it was wrong under the law to terminate Mr. Glover because of his age even though he was specifically told by his superiors, shortly before he made the challenged decision, that it was wrong under the law to terminate an employee because of his age. The Eighth Circuit reached this astonishing conclusion by ignoring relevant caselaw from other Circuits and by misinterpreting and misapplying two U.S. Supreme Court decisions.

The Eighth Circuit acknowledged that Mr. Barbeau was briefed on the prohibitions of the ADEA shortly before he selected Mr. Glover, along with two other employees, for termination in the reduction in force. On cross-examination, Mr. Barbeau testified:

> Q. Did anyone ever tell you, sir, that you were not supposed to discriminate against people because of

age? And by people I mean the employees of McDonnell Douglas, including Mr. Glover?

A. *See, we were told that age could not be a consideration in termination.*

Q. Okay. And you were told that by the lawyers, is that right?

A. Yes, sir.

Q. And by the human resources people?

A. Yes, sir.

(Tr. II at 128-130, 172) (emphasis added). Nevertheless, the Eighth Circuit did not think this testimony was sufficient to show that Mr. Barbeau knew it was wrong under the ADEA to terminate Mr. Glover on account of his age:

> It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold "that a violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA." 469 U.S. at 127.

See Appendix at A6-A7. The Eighth Circuit's analysis cannot be justified. Mr. Barbeau's testimony did not show he knew the ADEA was "potentially" applicable to his conduct; it showed he knew the ADEA was *in fact* applicable to his conduct. His handwritten notes, generated in connection with the reduction in force, confirm this reality. They contain such comments as "Disparate treatment - age a factor" and "Disparate impact - after the fact," and "Age 50-55 principal area of concern" (Exhibit 67). These comments showed a sophisticated understanding of the prohibitions of the ADEA. Mr. Barbeau could not have

written them unless he knew, after being briefed about the statute, that it was unlawful to terminate older employees, such as Mr. Glover, because of their age.

This is not a case, therefore, in which the decisionmaker merely knows the ADEA exists — that it is "in the picture" — without knowing, or strongly suspecting, that his conduct is actually forbidden by the statute. Doubtless such cases are rare. Rather, this is the more common case in which the decisionmaker actually knew, or strongly suspected, that his conduct violated the ADEA. Mr. Barbeau was specifically told it was unlawful to terminate an employee, such as Mr. Glover, in the reduction in force because of the employee's age. Nevertheless, he went ahead and did it anyway. This is precisely the kind of willful misconduct, with a consciousness of wrongdoing, which justifies an award of liquidated damages under the ADEA.[1]

Federal appellate courts in other jurisdictions agree. They have often upheld jury findings of willfulness based on the decisionmaker's testimony, usually elicited on cross-examina-

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[1] McDonnell Douglas cannot argue, without blushing, that Mr. Barbeau did not know it was unlawful to fire Mr. Glover because of his age. In fact, it has never made such an argument. Instead, it argued that the members of its "Review Committee," which approved Mr. Barbeau's decision to terminate Mr. Glover, acted in good faith without any willful age discrimination. According to McDonnell Douglas, the Committee's good faith insulated it from an award of liquidated damages. However, the Committee's review of Mr. Barbeau's decision was entirely perfunctory; it merely rubberstamped his decision (Tr. II at 134). Moreover, there is not a particle of evidence in the record that the Committee ever reviewed Mr. Barbeau's decision to terminate Mr. Glover for the specific purpose of determining whether it was age-based (Tr. II at 173). Had it done so, the Committee would have discovered, as the jury did, that it was the product of age discrimination. McDonnell Douglas is legally responsible for the willful misconduct of Mr. Barbeau, its managerial employee, in this case. *Am. Soc. of Mech. Engr's v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1947 and n. 14 (1982); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056-1057 (8th Cir. 1993).

tion, that he knew the ADEA proscribed the conduct he is accused of committing. The First and Eleventh Circuits are exemplars of this approach. The First Circuit has held:

> The principal owner of the company, Thomas Hazen, testified that he was "absolutely" aware that age discrimination was illegal. This is as strong evidence of a knowing violation of the ADEA as a plaintiff could wish.

Biggins v. Hazen Paper Co., 953 F.2d 1405, 1415 (1st Cir. 1992), *vacated on other grounds*, 113 S.Ct. 1701 (1993). Similarly, the Eleventh Circuit has held:

> Applying the *Thurston* standard for liquidated damages to the jury's fact findings, we hold Lindsey is entitled to liquidated damages. The jury found that ACIPCO intentionally discriminated against Lindsey because of his age and that its "legitimate" reasons for its decision were merely pretext for the discrimination. In addition, the defendant admitted at trial that it knew the ADEA prohibited consideration of an employee's age in making employment decisions. Joseph P. Doughty Jr., who was, at the time of the employment decision, Assistant Treasurer and Controller of ACIPCO, testified on cross-examination:
>
> Q: You were aware, were you not, at the time the decision was being made that it was discriminatory to consider someone's age in making a decision, weren't you?
>
> A: Yes.
>
> Q: And you knew about this Act that said you couldn't do that, didn't you?
>
> A: Yes. I'm aware of that.
>
> Together these facts satisfy the strictest prong of the *Thurston* willfulness standard: the employer *knew* that its conduct violated the ADEA. Thus, no danger exists in this case of

> imposing liquidated damages upon an employer who made a good faith effort to comply with the ADEA.

Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1099 and n. 5 (11th Cir. 1987) (emphasis in the original); *see also Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

It is not hard to figure out why the Eighth Circuit shunned the common sense approach taken by the First and Eleventh Circuits. The Eighth Circuit was worried that it is all too easy, in a garden-variety discharge case, for the plaintiff to show that the decisionmaker knew it was wrong under the ADEA to fire the plaintiff because of his age. A literal application of the *Thurston* standard of willfulness in such cases would lead to an almost automatic award of liquidated damages. "It must be remembered," the Eighth Circuit emphasized, "that Congress aimed to create a two-tiered liability scheme under which some but not all ADEA violations would give rise to liquidated damages." *See* Appendix at A7. For this proposition, the Eighth Circuit cited the U.S. Supreme Court's recent decision in *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1708 (1993).

But *Hazen Paper Co.* does not support the Eighth Circuit's decision. On the contrary, it undermines it. Prior to *Hazen Paper Co.*, many of the federal courts of appeal, including the Eighth Circuit, did all they could to avoid applying the plain language of the *Thurston* standard. It was not enough, they thought, for the plaintiff to show that the decisionmaker knew, or strongly suspected, that it was wrong under the ADEA to fire the plaintiff on account of his age. That was too easy. "Additional evidence" was needed. *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987). The "additional evidence" might be direct, as opposed to circumstantial, evidence of age bias, *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989), or evidence that age was the predominant, rather than simply a

determinative factor, in the challenged decision, *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1159 (10th Cir. 1990), or evidence that the employer's conduct was "outrageous." *Bethea, supra,* 827 F.2d at 359. These requirements were added to the *Thurston* standard in order to keep plaintiffs who prove intentional age discrimination from routinely recovering liquidated damages in ADEA cases. This result must be avoided at all costs, these courts thought, because it was inconsistent with the "two-tiered liability scheme" envisioned by Congress.

Their reasoning, however, runs headlong into *Hazen Paper Co.* In that case, the Supreme Court reaffirmed the *Thurston* standard of willfulness as originally formulated. Evidence that the employer's decisionmaker knew, or at least strongly suspected, that his conduct was prohibited by the ADEA is sufficient, without more, to justify an award of liquidated damages:

> It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages.

113 S.Ct. at 1710. The Court expressed "surprise" that several federal appellate courts, including the Eighth Circuit, misinterpreted the simple *Thurston* standard by engrafting additional requirements onto it. *Id.* at 1709. Significantly, the Court found their concern for maintaining a two-tiered liability scheme to be "misplaced:"

> The ADEA does not provide for liquidated damages where consistent with the principle of a two-tiered liability scheme. It provides for liquidated damages where the violation was willful.

Id. The Court noted that, while the *Thurston* standard might lead to an award of liquidated damages in most ADEA cases, it would not lead to an award of liquidated damages in all ADEA cases. In a narrow range of cases, liquidated damages would be denied:

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, . . . and exempts certain subject matters and persons . . . . [In addition], if an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Id. McDonnell Douglas has not invoked the BFOQ defense or any of the statutory exemptions from coverage under the ADEA to shield itself from liquidated damages in this case. Moreover, it has never suggested that if Mr. Barbeau discriminated against Mr. Glover he did so in the good faith belief that the ADEA permitted such discrimination. *Cf. Whitfield v. City of Knoxville*, 756 F.2d 455, 463-464 (6th Cir. 1985). Such a suggestion would be utterly untenable on the facts of this case. Accordingly, there was no basis under *Hazen Paper Co.* for the Eighth Circuit to vacate the jury award of liquidated damages in Mr. Glover's favor.

In short, the Eighth Circuit misinterpreted and misapplied the *Thurston* standard of willfulness. Although *Hazen Paper Co.* dramatically relaxed the legal requirements for an award of liquidated damages which previously prevailed in the Eighth Circuit, the Court of Appeals refused to acknowledge this reality. Instead, it behaved as if *Hazen Paper Co.* had never been decided. The Court did not make it easier for a victim of intentional age discrimination to recover liquidated damages, as the Supreme Court intended, but instead made it substantially more difficult. In fact, it made it impossible. Mr. Glover proved that Mr. Barbeau selected him for termination in the reduction in force because of his age. In addition, he proved that Mr. Barbeau knew it was unlawful to select him for termination because of his age but that he nevertheless went ahead and did it anyway. It is

hard to imagine, under these circumstances, what more Mr. Glover could have done to justify the jury award of liquidated damages in his favor. There is simply no way that Mr. Barbeau, after being told it was wrong under the law to fire an employee on account of his age, could have proceeded to fire Mr. Glover on account of his age without knowing it was wrong under the law to do so. This is not an esoteric point of law; it is elementary common sense. The Eighth Circuit tossed common sense aside, however, in its rush to preserve a "two-tiered liability scheme" in ADEA cases. Its concern for preserving such a scheme was, in the words of *Hazen Paper Co.*, "misplaced." 113 S.Ct. at 1709. The Supreme Court is not hostile, as the Eighth Circuit supposed, to an interpretation of the term "willful" which would result in an award of liquidated damages in most cases of intentional age discrimination. On the contrary, it has explained it is the natural consequence of the way Congress wrote the statute. *Id.*

The Eighth Circuit's decision squarely contradicts *Hazen Paper Co.* In addition, it squarely contradicts well-reasoned decisions from the First and Eleventh Circuits which, had they been applied in this case, would have yielded a different result. The Supreme Court must act now to remove the conflict between the Circuits over the proper interpretation of the liquidated damages provision of the ADEA. It must restore logic and coherence to the law by giving effect to *Hazen Paper Co.* As things stand now, the Eighth Circuit has made it impossible for victims of "intentional" age discrimination to prove "willful" age discrimination. This is intolerable; it thwarts the clear will of Congress. Because it cannot be justified, and sets a dangerous precedent at odds with the law in other Circuits, with *Hazen Paper Co.* and with the statutory scheme enacted by Congress, the Eighth Circuit's decision must be reconsidered and set aside as invalid.

CONCLUSION

For the reasons discussed, Mr. Glover asks the Supreme Court to grant his petition for certiorari.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1059EM

William F. Glover,
Plaintiff-Appellee,

v.

McDonnell Douglas Corp.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: December 10, 1993

Filed: January 7, 1994

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

On October 4, 1993, the United States Supreme Court vacated our previous decision in this case (reported at 981 F.2d 388 (1992)) and remanded for reconsideration in light of *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993). On reconsideration, we affirm in part and reverse in part.

I. BACKGROUND

Rather than reformulate the facts of his case, we set forth below the background substantially as it was explained in our prior opinion.

A. The Layoff

In the middle of 1987, McDonnell Douglas responded to declining business by consolidating its Astronautics, Electronics, and Microelectronics subsidiaries. The company determined that, as a result of the consolidation, approximately 120 jobs would have to be eliminated. Most of these jobs were eliminated when McDonnell Douglas instituted a voluntary severance program, but the program fell short of its goal, resulting in the need to lay off nineteen individuals.

Joseph Barbeau, the person in charge of the newly consolidated accounting department, was told that he had to select three people to be laid off. In February 1988 Barbeau selected the three employees, including Glover. Glover was fifty-nine years old and had worked for the Astronautics subsidiary for over twenty years. Glover had a BA degree and an associates degree but did not have a degree in accounting. His job was that of a "processor" in the Accounts Payable Section; his duties consisted primarily of reviewing invoices to insure they complied with the company's purchase orders. Glover sued McDonnell Douglas, alleging he had been selected for termination based on his age and was denied consideration for reassignment to another subsidiary based on his age.

B. The Trial

In outlining the evidence presented at trial, we find it more expedient to discuss McDonnell Douglas' evidence first. Barbeau testified that he began working for the Astronautics division in the summer of 1987. In the middle of January, 1988, Barbeau was told that three people would have to be laid off, but he was not told how to go about selecting those three people. He was permitted to chose any three employees, whether they were salaried or hourly, full-time or part-time. In making his determination, he relied on the company's "totem poles." The totem poles ranked employees, with the better performers and most

valuable employees being listed closer to the top. Totem poles were generated annually by each subsidiary and used as, among other things, a factor in awarding merit raise. In determining who was to be laid off, Barbeau obtained the totem poles for each newly consolidated subsidiary from 1985, 1986, and 1987. During these three years, all three subsidiaries utilized separate poles for salaried and non-salaried employees. On the Astronautics' subsidiary's totem pole for 1987, Glover ranked 42 out of 42 salaried employees; in 1986, he was ranked 39 out of 43; and in 1985, he ranked 30 out of 52. Barbeau testified that if salaried and hourly employees were combined on one totem pole, Glover would have ranked 57 out of 61 in 1987. From the totem poles, Barbeau created a list of employees that had consistently ranked near the bottom in the preceding three years. He then began acquiring other information about the employees by talking to other supervisors. Barbeau wrote some (but not all) of this information down; included in this information was the statement that one of the employees on his list was "young" and had "more potential." After conversing with the other supervisors, Barbeau created a preliminary list of approximately fifteen candidates for layoff and ranked the top six; Glover was ranked as the second candidate.

Barbeau then consolidated much of his previously collected information and added information reflecting each employee's age, years of service, and absentee record. On approximately January 18, he discussed the information with his staff, whereupon it was decided that Glover should be among those laid off. Barbeau prepared yet another, more detailed copy of his information and had two further discussions with representatives from McDonnell Douglas' legal and human relations departments. At these meetings, Barbeau was told that if all things were equal between two or more likely candidates, years of service could be considered (with greater seniority being rewarded). He was also given some basic information about the ADEA.

Glover testified that he inquired about moving to McDonnell Douglas' Aircraft subsidiary, and to that end spoke with Jim Cleeton. Glover testified that Cleeton told him he would not be considered because of his age. Cleeton testified and denied making that statement. Glover also testified about his experiences in finding another job, and that the combination of being laid off and the menial nature of his new job caused him to experience disruptive sleep habits, a diminished desire for food, and a degree of humiliation sufficient to prevent him from socializing as much as he had before being laid off. Also testifying on Glover's behalf were four other employees in accounts payable. All four were significantly younger than Glover, were hourly employees, and had less education and experience. One of these employees had received particularly critical job appraisals, and another ranked below Glover on the combined totem pole; no information was provided about the other employees' job performance or their positions on any totem poles. None of these employees was laid off in February of 1988. Because these processors were hourly employees, they did not appear on the same totem poles as Glover, who was a salaried employee.

The jury returned a verdict in Glover's favor and awarded him $30,000 in backpay, $100,000 in emotional distress damages, and $100,000 in punitive damages. The jury found the violation to be willful, and the district court accordingly awarded Glover an additional $30,000 in liquidated damages. The court also granted Glover equitable relief in the form of reinstatement and pension credit. McDonnell Douglas appeals.

II. DISCUSSION

A.

In its appeal, McDonnell Douglas raised issues relating to the proper standard of review on appeal (Part A of our prior opinion), the sufficiency of the evidence (Part B), the correctness of certain

jury instructions (Part C), the award of emotional damages under state law (Part D), the finding of a willful violation (Part E), the award of punitive damages under state law (Part F), and the granting of pension credit (Part G). Though the Supreme Court's order vacated our prior opinion as it related to all these issues, it remanded for reconsideration in light of *Hazen Paper*. This case is relevant to the case at bar only for its discussion of the standard to be used in determining whether a violation is willful. Though we are free to revisit all the issues in this case, we do not think it necessary to do so at any great length.[1]

With regard to the other issues, our decisions are the same as they were earlier. Specifically, we hold that the traditional standard of review should apply, and that though "[s]harply contrasting testimony was presented to the jury,... the jury chose to believe Glover [and] there is nothing in the record that demonstrates, as a matter of law, this decision was improper or unfounded." *Glover*, 981 F.2d at 393. We also hold that the jury instruction was properly based on the *Price-Waterhouse*[2] formulation for mixed-motive cases. We reverse the award of emotional distress damages awarded under Missouri law because there was no expert medical testimony offered to support Glover's claim as required by Missouri law. We reverse the punitive damage award under state law because there was "no evidence of evil motive or reckless indifference on McDonnell Douglas' part" as required by Missouri law. *Glover*, 981 F.2d at 396. Finally we vacate the award of pension credit because "the district court's order puts Glover in a better than whole position; he gets back pay, pension benefits as if he had not been termi-

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[1] Upon receiving notice of the remand, we entered an order granting the parties leave to file briefs, with the discussions "limited to the effect of *Hazen Paper Co.* on the award of liquidated damages, which constitutes Part E of our earlier opinion." Glover has filed a motion for leave to file a supplemental brief discussing Parts D and F of our prior opinion. That motion is denied.

[2] *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

nated, and the pension benefits he has already received." *Id.* at 397.[3]

B.

In *Hazen Paper*, the Supreme Court decided that the standard for willfulness enunciated in *Trans World Airlines. Inc. v. Thurston*, 469 U.S. 111 (1985) "applies to all disparate treatment cases under the ADEA," whether they be based on company policies or on individual or isolated employment decisions. 113 S. Ct. at 1710. This standard requires "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.*

Having previously applied the *Thurston* standard in this case, *Glover*, 981 F.2d at 395-96, it is a relatively simple matter to do so again. We continue to believe that "[t]here is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory." *Id.* at 396.[4] Therefore, there was insufficient evidence to sustain the jury's determination that the violation was willful, and liquidated damages should not be awarded.

It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold "that a

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[3] Though it has been vacated and therefore lacks precedential value in future cases, the parties and the district court are invited to rely on our prior opinion as it relates to these issues (all but part E) for purposes of resolving matters on remand.

[4] This result was foreshadowed by our earlier discussion of *Hazen Paper*, which had not yet been decided. We stated that "our decision today will be unaffected; if *Thurston* continues to apply, the law — and our decision — will be unchanged." *Glover*, 981 F.2d 396 n.2.

violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA." 469 U.S. at 127.

Our earlier thoughts on this matter were not incorrect simply because our opinion was later described as holding that the "liquidated damages award must be supported by evidence beyond the minimum necessary to prove the violation," *Brown v. Stites Concrete. Inc.*, 994 F.2d 553, 559 (8th Cir. 1993) (en banc). It must be remembered that "Congress aimed to create a 'two-tiered liability scheme,' under which some but not all ADEA violations would give rise to liquidated damages." *Hazen Paper*, 113 S. Ct. at 1708. Therefore, there will necessarily be differences between the evidence in a non-willful case and the evidence in a willful case. A violation of the ADEA does not require any particular mental state, but the award of liquidated damages under the ADEA does. In the case at bar, we did not (and do not) fault Glover for failing to present "direct rather than circumstantial" evidence of discrimination, outrageous conduct by the employer, or proof that age was a "'predominant' rather than simply a determinative factor," all of which practices were criticized by *Hazen Paper*. 113 S. Ct. at 1709. Instead, we hold that though Glover has presented a case from which a jury could find he was terminated based on his age, he has not presented a case from which a jury could find that this action was taken with reckless disregard for Glover's rights under the ADEA.

III. CONCLUSION

We affirm the jury's finding of age discrimination and the award of backpay. We reverse the jury's finding of willfulness and vacate the corresponding award, as well as the awards for punitive and emotional damages. Finally, we remand to the district court so that it may modify its grant of equitable relief.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.